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Hicom Tan & Tan Sdn Bhd v Seri Hijauan Joint Management Body

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02-(NCVC)(W)-1240–05 OF 2013
ZAHARAH IBRAHIM, DAVID WONG AND ABANG ISKANDAR JJCA
10 MARCH 2014

Evidence — Burden of proof — Allegation of particular fact — Joint management body ('JMB') of condominium alleged monies received by developer from state authority for overpayment of quit rent rightfully belonged to JMB — Allegation that developer was constructive trustee of monies received — Whether JMB failed to prove monies belonged to individual owners in condominium complex — Whether developer had proven entitlement to monies on balance of probabilities

The appellant was the developer of a condominium complex and had managed the same before the respondent was formed to take over the management. During the time it managed the complex, the appellant, as registered owner of the land on which the complex stood, had been paying quit rent to the state authority. Sometime after the respondent had come into being, the state authority refunded to the appellant RM123,294 it had overpaid in quit rent during the time it was managing the complex. From that amount, the appellant deducted RM100,142.96 and paid the balance to the respondent. The respondent sued the appellant in the High Court to declare that the RM100,142.96 belonged to it and that the appellant held that sum as trustee for the respondent. The High Court allowed the respondent's claim holding, inter alia, that the Strata Management Act 2013 applied to the case. The instant appeal was against the High Court's decision.

Held, allowing the appeal with costs of RM5,000 for here and below:

(1) The only determinative issue in this appeal was whether the respondent had proven that the sum of RM100,142.96 was in fact monies that belonged to the individual owners in the condominium complex. The respondent had all relevant documents in its possession at the start of the suit showing which individual owners had or had not paid quit rents and how much was paid. Those documents were not produced at the trial. The respondent had failed to discharge its burden of proof. Hence, the question of the appellant being a constructive trustee did not arise at all (see paras 9, 16, 19 & 22).

(2) There was no provision in law which deemed that monies received by the appellant prior to the formation of the joint management body belonged

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to the respondent irrespective of whether the monies were paid for by the appellant. That proposition of law was without legal or equitable basis (see para 20–21).

(3) Although it was not the appellant's duty to rebut when the respondent had not proved a prima facie case, the appellant had proven on balance of probabilities that the sum of RM100,142.96 was paid by it and that it was entitled in law to be reimbursed from the refund made by the state authority. Through the evidence of SD1 and SD2, the appellant had provided adequate proof that that sum rightly belonged to it (see paras 21–20).

(4) The High Court was wrong to have applied the Strata Management Act 2013 in its deliberation. Although that Act had been *gazetted*, the relevant Minister had yet to decide as to when the same would become law (see para 17).

[Bahasa Malaysia summary

Perayu adalah pemaju kompleks kondominium dan mengedalikan yang sama sebelum responden ditubuhkan untuk mengambil alih pengurusan. Pada masa ia mengendalikan kompleks, perayu, sebagai pemilik berdaftar tanah di mana kompleks yang didirikan, telah membayar cukai tanah kepada pihak berkuasa negeri. Beberapa ketika selepas responden telah ditubuhkan, pihak berkuasa negeri mengembalikan RM123,294 kepada perayu yang mana ia telah terlebih bayar cukai tanah di dalam masa mengendalikan kompleks. Daripada jumlah itu, perayu menolak RM100,142.96 dan membayar bakinya kepada responden. Responden mendakwa perayu di Mahkamah Tinggi untuk mengisytiharkan bahawa RM100,142.96 itu miliknya dan bahawa perayu memutuskan jumlah wang itu sebagai pemegang amanah bagi pihak responden. Mahkamah Tinggi membenarkan tuntutan responden memutuskan, antara lain, bahawa Akta Pengurusan Strata 2013 terpakai untuk kes itu. Rayuan ini adalah terhadap keputusan Mahkamah Tinggi.

Diadakan, membenarkan rayuan dengan kos sebanyak RM5,000 untuk makamah ini dan bawahan:

(1) Satu-satunya isu penentuan dalam rayuan ini ialah sama ada responden telah membuktikan bahawa jumlah RM100,142.96 adalah wang yang sebenarnya kepunyaan pemilik individu di kompleks kondominium itu. Responden mempunyai semua dokumen yang berkaitan dalam milikannya pada permulaan saman menunjukkan yang pemilik individu telah atau tidak membayar cukai tanah dan berapa banyak yang telah dibayar. Dokumen tidak dikemukakan pada perbicaraan itu. Responden telah gagal melepaskan beban pembuktian. Oleh itu, persoalan perayu sebagai pemegang amanah konstruktif tidak timbul sama sekali (lihat perenggan 9, 16, 19 & 22).

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(2) Tidak ada peruntukan dalam undang-undang yang menganggap bahawa wang yang diterima oleh perayu terdahulu daripada pembentukan badan pengurusan bersama dipunyai oleh responden tidak kira sama ada wang yang telah dibayar oleh perayu. Bahawa cadangan undang-undang adalah tanpa asas undang-undang atau ekuiti (lihat perenggan 19).

(3) Walaupun bukan menjadi tanggungjawab perayu untuk mematahkan apabila responden tidak membuktikan kes prima facie, perayu telah membuktikan pada imbangan kebarangkalian bahawa sejumlah RM100,142.96 telah dibayar olehnya dan bahawa ia berhak dalam undang-undang untuk dibayar balik daripada bayaran balik yang dibuat oleh pihak berkuasa negeri. Melalui keterangan SD1 dan SD2, perayu telah mengemukakan bukti yang mencukupi bahawa jumlah wang itu memang miliknya (lihat perenggan 20–21).

(4) Mahkamah Tinggi terkhilaf mengguna pakai Akta Pengurusan Strata 2013 dalam pertimbangannya. Walaupun Akta yang telah diwartakan, Menteri yang berkaitan masih belum membuat keputusan tentang bila yang sama akan menjadi undang-undang (lihat perenggan 17).]

Notes

For cases on allegation of particular fact, see 7(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 488–495.

Cases referred to

Chow Kay Kong v Ching Tong & Ors [1967] 2 MLJ 31, FC (refd)
Eastern Enterprise Ltd v Ong Choo Kim [1969] 1 MLJ 236 (refd)
Ng Tien & Anor v Chow Nim Yan [1990] 3 MLJ 373; [1990] 2 CLJ 937, SC (refd)
Seladuray v Chinniah [1939] 1 MLJ 253 (refd)

Legislation referred to

Evidence Act 1950 s 101
Strata Management Act 2013

Appeal from: Suit No 22 NCVC-797–06 of 2012 (High Court, Shah Alam)

Andrew Teh (Sara Anthony with him) (Wong Lu Peen & Tunku Alina) for the appellant.
Joshua Kevin Sathiaseelan (Azura Adnan with him) (Kevin & Co) for the respondent.

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David Wong JCA (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal against the High Court decision in which learned judge had allowed the respondent's claim of RM100,142.96 being excess payment of quit rent made by the appellant to the State Authority of Selangor ('the state authority').

[2] We heard the appeal and after hearing respective submissions, we allowed the appeal and now give reasons for our decision.

BACKGROUND FACTS

[3] The factual matrix is largely undisputed and for convenience we adopt the summary as stated by learned counsel for the appellant with the appropriate amendments.

[4] The appellant is the developer of a condominium complex at Shah Alam ('condominium complex') and prior to the establishment of the respondent had managed the same.

[5] The appellant had appointed one Kondoservis Sdn Bhd to collect contributions from the owners of the parcels in the condominium complex.

[6] The respondent is the joint management body established on 7 May 2008 and since then had taken over the management of the condominium complex.

[7] During the management of the condominium complex under the appellant, quit rent had been paid to the state authority. However there appears to be some overpayment of the quit rent resulting in a refund of RM123,294 to the appellant. This overpayment was the result of a successful appeal made by the appellant to the state authority to treat the condominium complex as a residential rather than commercial building. That being the case, the appellant deducted a sum of RM100,142.96, being the amount of quit rent paid by it during its management, and paid the balance of RM23,151.04 to the respondent.

[8] The respondent refused to accept the deduction of RM100,142.96 and commenced this suit to seek the following declarations:

(a) the refunded amount of RM123,151.04 by the state authority belongs to the respondent; and

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(b) the sum of RM100,142.96 is held by the appellant as trustee for the respondent.

OUR GROUNDS OF DECISION

[9] It is our considered view that the determinative issue is only one, and it is this:

> Whether the Respondent/Plaintiff had proved that the sum of RM100,142.96 being quit rents had in fact been paid by individual owners of the condominium complex?

[10] Before we deliberate on this issue, we find it appropriate to restate the basics in relation to the legal burden of proof. The starting point is s 101 of the Evidence Act which states as follows:

> The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
>
> ILLUSTRATIONS
>
> (a) A prosecutes B for theft and wishes the court to believe that B admitted the theft to C. A must prove the admission.
>
> (b) B wishes the court to believe that at the time in question he was elsewhere. He must prove it.

[11] What s 101 encompasses can be seen from what is stated in *Seladuray v Chinniah* [1939] 1 MLJ 253 (at pp 196–197):

> It is clear that the onus is on the plaintiff to prove his case. After the conclusion of the whole case there must be some preponderance in his favour. It may be true that the plaintiff established a prima facie case, but at the conclusion of the trial the learned judge has found that the position was exactly even, ie that any preponderance in the plaintiff's favour had disappeared. That being the case the plaintiff must necessarily fail, as he has not discharged the onus which is upon him.

[12] Similar sentiments are expressed in *Chow Kay Kong v Ching Tong & Ors* [1967] 2 MLJ 31 (at p 32) where the court states as follows:

> ... I think it is sufficient to say that, where the evidence on both sides was so evenly balanced that the judge had to look for evidence elsewhere to decide the issue, it is abundantly clear that the appellant had failed to discharge the onus of proof which rested on him as the plaintiff.

[13] In *Eastern Enterprise Ltd v Ong Choo Kim* [1969] 1 MLJ 236 (at p 244), the court expressed the same sentiments:

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> ... I accordingly find that the plaintiffs have not discharged the burden of proving a case against the defendant in the first place. No burden accordingly shifts to the defendant ... *the defendant would not have to disprove something which has not been proved against him*.
>
> (Emphasis added.)

[14] The respondent in this appeal is the plaintiff in the High Court and it has come to court to seek reliefs set out in its claim. The basic principle of law as set out above places the burden of proof on it to prove its claims. In this case, in simple and plain English it has to prove that the sum of RM100,142.96 rightfully belongs to the individual owners of the condominium project.

[15] At this juncture it is our view that the appellant is entitled to be reimbursed for payments of quit rents made by it prior to the formation of joint management company. Our view is premised on common sense and fairness. Prior to the formation of the joint management body, the appellant as the registered owner of the condominium project is required by law to pay the quit rents for the condominium complex. It is also required to collect contributions from the individual owners to defray expenses incurred for the management of the condominium complex. Under such circumstances, we can infer that there is an understanding amounting to an enforceable agreement between the appellant and the individual owners that the appellant is entitled to be reimbursed of payments of quit rents paid for and on behalf of the individual owners.

[16] Reverting back to the issue at hand, the respondent called PW1, its one and only witness, to prove its claims. As pointed out by learned counsel for the appellant, the respondent as the legitimate joint management body at the start of this suit has in its possession all the relevant documents showing which individual owners had or had not paid quit rents and how much was paid. These documents should have been produced at the trial and we have not been told the reasons why they were not produced and the difficulty in presenting them.

[17] Instead of producing such evidence, the respondent had relied on the applicability of the Strata Management Act 2013 to advance their reasons to justify their claims. The learned judge upheld the respondent's contention. It is undisputed that the Strata Management Act 2013 had been *gazetted* but the relevant minister had not decided as to when the same will become law. That being the case, the learned judge was wrong to apply the Strata Management Act 2013 in his deliberation.

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[18] Hence it is understandable that we do not see any reference to the Strata Management Act 2013 in the respondent's submissions before us. Instead, learned counsel for the respondent relies on the principle of constructive trust which as defined by Jemuri Serjan SCJ in the case of *Ng Tien & Anor v Chow Nim Yan* [1990] 3 MLJ 373; [1990] 2 CLJ 937 as this:

> As such since he had acted and still acts in a fiduciary capacity which imposes relevant fiduciary duties upon him, he can also be held as a constructive trustee. Again in that same case Slade J at p 398 said:
>
> > I do not think that the categories of fiduciary relationships which give rise to a constructive trusteeship should be regarded as falling into a limited number of strait-jackets or as being necessarily closed. They are, after all, no more than formulae for equitable relief. As Ungoed-Thomas J said in *Selangor United Rubber Estates Ltd v Cradock (No 3)*:
> >
> > > The court of equity says that the defendant shall be liable in equity, as though he were a trustee. He is made liable in equity as trustee by the imposition or construction of the court of equity. This is done because in accordance with equitable principles applied by the court of equity it is equitable that he should be held liable as though he were a trustee. Trusteeship and constructive trusteeship are equitable conceptions.
>
> With respect, we agree with this view on the formulation of a category of constructive trusteeship.

[19] Learned counsel for the respondent relies on the relationship of the appellant as a developer with the respondent as representative of individual owners of the condominium complex. On a cursory glance we have no issue with the contention of learned counsel for the respondent. However, we are duty bound to examine the totality of the evidence to determine what this 'equity' encompasses. From the submission of learned counsel for the respondent, he seems to be submitting that any monies received by the appellant prior to the formation by the respondent are held on trust for the respondent irrespective of the nature of the monies. As stated above, the burden is on the respondent to prove that the disputed monies were in fact monies belonging to the individual owners of the condominium complex. With respect we see no evidence of that. Hence the question of constructive trust does not arise at all. There is no provision in law which deems that monies received by the appellant prior to the formation of the joint management body belongs to the respondent irrespective whether the monies were paid for by the appellant. In any event that proposition of law is without legal or equitable basis.

[20] Be that as it may, the appellant on the other hand had through the evidence of SD1 and SD2 provided adequate proof that the sum of RM100,142.96 rightly belonged to it. It had produced documentary proof in the form of financial statements with quit rents receipts, debit notes, payment

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vouchers and bank in slips. These documents can be found in the record of appeal Vol 2 (pp 191, 203, 217 and 232) and Vol 3 (pp 255–267 and 304–314).

[21] Though it is not the duty of the appellant to rebut when the respondent had not proved a prima facie case, the appellant's evidence is such that in our view it has proven that on the balance of probabilities the sum of RM100,143 was paid by it and as such is entitled in law to be reimbursed from the refund made by the state authority.

[22] Accordingly, we find that the respondent as the plaintiff in the High Court had failed to discharge the burden of proof required by law.

CONCLUSION

[23] For reasons stated above, we allowed the appeal with costs in the sum of RM5,000 for here and below. We also set aside the orders of the High Court and ordered that the deposit be refunded to the appellant.

Appeal allowed with costs of RM5,000 for here and below.

Reported by Ashok Kumar